

## OPWDD ASSESSMENT OF PUBLIC COMMENT Pathway to Employment Service

This document contains responses to public comments submitted about the Pathway to Employment service during the public comment period for the proposed regulations for this service (note: the proposed regulations have since been finalized/permanently adopted). OPWDD received comments from two providers of services to people with developmental disabilities, five provider associations, and the New York State (NYS) Education Department's Office of Adult Career and Continuing Education Services.

Note: This assessment does not respond to comments submitted that did not directly address the proposed regulations (e.g. comments about training and service provision). OPWDD responded to those comments in a separate document on its website. Additionally, this assessment does not provide answers to questions submitted. Questions on the Pathway to Employment service are being answered in a different venue.

**Comment:** A provider and provider association are concerned that the reimbursement rate for service delivery in Region 3 will not cover the cost of the Pathway to Employment service. A provider association commented that reimbursement for Region 3 as specified in the proposed regulations is not equitable to reimbursement in the other two remaining regions.

**Response:** OPWDD agrees that the Region 3 fee needs to be increased to promote equity in service delivery among regions. Consequently, OPWDD collaborated with the Department of Health to adjust the Region 3 fee, and recently promulgated an emergency regulation that increases the hourly fees for this Region. The emergency regulation took effect on July 1, 2014 to coincide with the effective date of the Pathway to Employment service.

**Comment:** A provider association is concerned that the rate structure for the Pathway to Employment service is a disincentive to providers in providing person centered services. The provider recommends that OPWDD consider re-balancing the dollars so that agencies have the financial option to provide services in an approach that meets each person's needs most effectively.

**Response:** OPWDD appreciates the feedback on the rate structure for Pathway to Employment. Since the annual reimbursement for Pathway to Employment will be significantly higher than current Supported Employment fees, OPWDD believes that this will incentivize providers to assist individuals with developmental disabilities in achieving their employment goals.





**Comment:** A provider association suggested that the following activities listed as involving direct service provision also be listed as involving indirect service provision since these activities could involve both types of service provision: job related discovery; assessment for use of assistive technology to increase independence in the workplace; career/vocational planning; customized job development; and planning for self-employment, including identifying skills that could be used to start a business, and identifying business training and technical assistance that could be utilized in achieving self-employment goals.

**Response:** OPWDD has intentionally categorized the activities noted above as only involving direct service provision because OPWDD considers that interaction with the individual during these activities would make service delivery more meaningful. Consequently, the regulations are designed to discourage providers from participating in activities that do not involve interaction with the individual unless such activities never involve interaction and are only conducted on behalf of the individual. OPWDD is therefore promulgating the regulation without the suggested changes.

**Comment:** A provider association suggested that travel time, case note/reporting time, and advocacy, be added to the list of activities involving indirect service provision.

**Response:** OPWDD appreciates the feedback on the allowable activities for Pathway to Employment. OPWDD disagrees with the suggestion to add travel time as an allowable activity involving indirect service provision (i.e. staff is not with an individual receiving services). However, OPWDD is planning to add transportation as an allowable activity involving direct service provision (i.e. staff is with an individual receiving services). OPWDD considers that advocacy and case note/reporting are allowable activities to the extent that they meet the criteria for an allowable activity listed in the proposed regulation.

**Comment:** A provider requested clarification that the group size limit of three individuals applies to the size of a group during countable service delivery time for which one staff member is providing service (as opposed either to a “caseload” limit for an individual staff or to the agency as a whole), and that there is no outside limit to the number of individuals who can be supported in Pathway to Employment, provided that the agency has sufficient staff and authorized units.

A provider association recommended that the group limit be increased from three to four so that program participants can be paired for observation of skills, interpersonal interactions, peer training and mentoring, and to





accommodate for attendance fluctuations, particularly for people with greater health or behavioral support needs. A provider association commented that there may be times that the group size should exceed the limit of three.

A provider association applauded the inclusion of the provision limiting group sizes to three or less individuals.

**Response:** OPWDD confirms that the group size limit applies to the size of the group during service delivery. OPWDD's intention is for Pathway to Employment to be an individualized service; however, OPWDD recognizes that some activities may lend themselves to being provided in a group setting. OPWDD considers that the group size must be small enough to maintain the individualized nature of the service. OPWDD is therefore promulgating the regulation without changes to this requirement.

**Comment:** A provider asserted that the requirement that the Pathway to Employment service be limited to 12 months/278 hours of service is not realistic or reasonable as it applies to Region 3, given the current unemployment rates of 8.6% and 7.6% (non-metro and metro counties, respectively) in the upstate area. The provider remarked that Region 3 consists of many rural and relatively unpopulated areas with limited employment opportunities.

A provider association questioned the need for a 12 month/278 hour timeframe requirement. This provider association suggested that the clock stop once the individual achieves his or her vocational outcomes and that the 12 month timeframe should be more of a guideline to establish true readiness and/or a need for a more intensive service to complete discovery based on an individual's needs. A provider association stated that the 12 month/278 hour timeframe requirement may not adequately reflect a person centered approach in addressing a person's life time employment goals.

A provider association observed that the 12 month/278 hour limit excludes individuals interested in career advancement from participation in the service, and the provider association asserted that the Pathway to Employment service should also serve this need. A provider association commented that the lifetime cap does not provide additional support that may be needed to develop new skills or to explore other types of employment opportunities during the course of a person's career. The provider association referenced a scenario described by family member whereby the family member's son was competitively employed a half a dozen times for periods of up to two years but was fired or had to leave jobs for health reasons.





A provider association recommended that the timeframe for the service be extended to 24 months, and two provider associations recommended that OPWDD allow for an extension of an additional term of 278 hours for those individuals who may require additional time for further job exploration and development. A provider association suggested that an agency's overall performance in the program be considered in the decision to grant the request for an extension.

Two provider associations expressed concerns about the lifetime cap of 556 hours as it excludes individuals who need additional time from the program and it is premature to establish a lifetime cap for a service which is essential to helping individuals attain employment, a goal of both OPWDD and providers.

A provider association recommends that for each 278 hour term of service, 60 hours be allotted for indirect services as opposed to the requirement to limit indirect service provision to a total of 60 hours for the lifetime of the service.

**Response:** OPWDD considers that the 12 months/278 hours timeframe requirement for completion of the Pathway to Employment service is a reasonable timeframe for an individual for discovery, engagement in pre-employment activities and development of a vocational plan. Therefore, OPWDD is retaining this requirement in its final regulations. OPWDD notes that the regulations allow providers to submit a request to OPWDD for an extension of the service for an additional 12 months/278 hours. Providers may request an extension of the timeframe requirement for individuals who need more time achieving their vocational outcomes.

OPWDD designed the Pathway to Employment service to be a transitional service that transitions individuals from school or Prevocational services into competitive employment. OPWDD expects that the timeframe requirements in the regulation will direct individuals towards individualized, needs-based services in a timely manner. The timeframe requirements will motivate providers and individuals in determining whether or not an individual is ready for competitive employment. If the timeframe requirements do not motivate individuals to make a transition as intended, then the requirements will prompt individuals to select a more appropriate service option (e.g. Prevocational services, Community Habilitation, or Day Habilitation). Due to the transitional nature of the Pathway to Employment service, it is not designed to address career advancement. Providers may utilize the supported employment service to assist individuals with career advancement. OPWDD is currently working on changes to the Supported Employment service to improve supports offered for career advancement.





At this time, OPWDD considers that 60 hours is a sufficient amount of time for participation in activities involving indirect service provision. However, if upon implementation of the service, OPWDD observes that more hours are needed, OPWDD will consider changes to this requirement.

Consequently, OPWDD is promulgating the regulations with no changes to timeframe requirements.

**Comment:** A provider recommended that, regarding the requirement that individuals who participate in paid internship be paid at least the minimum wage, there be exceptions for individuals who are pursuing a career path in self-employment. The provider asserted that people who start up their own businesses very often do not immediately produce enough net income such that they would earn the equivalent of minimum wage or higher. The provider expressed that work as an artist, craftsman, or other similar self-employment endeavor may result in great personal satisfaction and self-worth yet may not result in financial wealth. The provider argued that the regulation should not force the payment of a wage level in such paid internships that could undermine successful self-employment pursuits by setting unrealistic earnings expectations. The provider cited the New York Labor Law as providing limited exceptions to the payment of minimum wage for certain employees such as those who work on a family farm and perhaps others (assistant camp counselors, church caretaker, companionship worker, newspaper delivery, etc.). The provider concluded that paid internships in these jobs should be permitted at the commensurate wage consistent with NY Labor Law.

Similarly, a provider association asserted that jobs and internships that are exempt from minimum wage and are considered legal employment (such as certain restaurant jobs) should be included as allowable, and that self-employment including the creation of art where the sale of such products may not result in a salary that reaches minimum wage also be allowed. Another provider association recommended that, regarding self-employment and compensation for individuals working in the informal economy, OPWDD address the mechanism that agencies would use to demonstrate achievement of meeting the minimum wage standard in fluid compensation environments.

**Response:** OPWDD considers that the provider and provider association raised some good points, and recognizes that there are no minimum wage requirements for certain types of employment and self employment. OPWDD observes that the phrase "New York State minimum wage," as used in the proposed regulations, may also mean no minimum wage for certain types of employment and self employment. OPWDD agrees with the idea that paid internships be permitted at the commensurate wage established for





the type of employment or self-employment sought through the internship opportunity. OPWDD made this clarification in its emergency regulations.

**Comment:** The NYS Education Department’s Office of Adult Career and Continuing Education Services (ACCES-VR) commented that the regulations contain an outdated citation. ACCES-VR suggested that the reference to the Individualized Written Rehabilitation Plan (IWRP) be changed to the Individualized Plan for Employment (IPE), which replaced the IWRP in 1998.

**Response:** OPWDD agrees with ACCES-VR and updated the reference in its emergency regulations.

**Comment:** A provider association cautioned that the definitions of all terms be fully explained and coincide with federal guidelines and regulations, and that there be consistency in definitions across the service systems so that individuals who may need services from different sources are not removed from a valued service eligibility.

**Response:** OPWDD agrees with the provider association that there should be consistency in definitions of terms. OPWDD has taken into account the importance of consistency in the development of the Pathway to Employment service and requirements, and will continue to focus on consistency as it implements this service. OPWDD is promulgating the regulations without further explanation of terms used in the requirements, but will consider providing such explanation in its guidance on the service.

**Comment:** The provider also noted that the regulations do not appear to require prior denial from ACCES-VR as an eligibility criterion and is requesting confirmation that prior denial is not an eligibility criterion. Additionally, the provider is unclear as to how individuals who are eligible for supported employment through ACCESS-VR, or who are about to graduate, but who have not yet established eligibility for services and who are therefore not enrolled in the Home and Community Based Services (HCBS) waiver, would access Pathway to Employment services.

**Response:** OPWDD confirms that prior denial from ACCES-VR is not an eligibility criterion for enrollment in Pathway to Employment.

OPWDD has determined that individuals who are about to graduate, but who have not yet established eligibility for services and who are therefore not enrolled in the HCBS waiver, would not have access to the Pathway to Employment service. OPWDD requires HCBS waiver enrollment as a condition for enrollment into the Pathway to Employment service.



OPWDD is promulgating the regulations without any changes to eligibility requirements.

